Supreme Court, U. S.
FILED
FEB 20 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1191

FRANK DeGUISEPPE,

Petitioner,

vs.

BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF BELLWOOD, LLOYD HOWARD and LOUIS A. NELSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT, FOURTH DIVISION

STANLEY H. JAKALA
3219 Maple Avenue
Berwyn, Illinois 60402
Telephone: (312) 788-5733
Attorney for Petitioner

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING WRIT:	
I.	
That The Promotion Of Lt. Dwight Wulf To Chief Of Police Of The Bellwood Police Department Created A Lieutenant's Vacancy In That Lt. Dwight Wulf Was Furloughed From That Rank And That Such Lieutenant's Vacancy Required The Promotion Of A Sergeant To Lieutenant Resulting In A Sergeant's Vacancy To Which Sergeant's Vacancy The Petitioner Should Have Been Promoted	6
II.	
That The Sergeant's Promotional List Of 1968 Of The Village Of Bellwood Did Not Expire Based Upon The Existing Sergeant's Vacancy	8
III.	
That Petitioner Did Not Waive His Right To Be Promoted From The 1968 Promotional List When He Subjected Himself To A Subsequent Sergeant's Promotional Examination On February 11, 1972	9

IV.
That The Petitioner Was Not Guilty Of Laches On The Basis Of The Discovery Rule As Applied By The Illinois Courts In Other Cases 10

CONCLUSION 12

APPENDICES:

A—Opinion of the Illinois Appellate Court 1a

B—Order Denying Leave to Appeal 8a

TABLE OF AUTHORITIES

Cases

Anderson v. Doss, 133 Ill. App. 798 (1971) 10, 11
Bovinette v. The City of Mascouth, 55 Ill. 2d 129 (1973) 7
Kadon v. Board of Fire and Police Commissioners of the Village of River Forest, 45 Ill. App. 2d 425 (1964) 8, 9, 10, 11
Lipsey v. Michael Reese Hospital, 46 Ill. 2d 32, 262 N.E. 2d 450 (1970) 10, 11
People ex rel. Varallo v. Linskey, 12 Ill. App. 2d 76 (1956) 8
Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E. 2d 656 (1969) 10, 11
Schoonmaker v. George, et al., (1974) 74 N.E. 2d 650 6

Constitutional Provisions and Statutory Authorities

United States Constitution, Amendment (V) 3, 7, 10, 12
United States Constitution, Amendment (XIV) .. 4, 7, 10, 12
Smith-Hurd Illinois Annotated Statutes, Cities and Villages, Chap. 24, Sec. 10-2.1-4 ..... 6, 7
Smith-Hurd Illinois Annotated Statutes, Supp., Cities and Villages, Chap. 24, Sec. 10-2.1-15 ..... 8, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

FRANK DeGUISEPPE,

Petitioner,

VS.

BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF BELLWOOD, LLOYD HOWARD and LOUIS A. NELSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT, FOURTH DIVISION

Petitioner, Frank DeGuiseppe, respectfully prays that a Writ of Certiorari issue to review the judgment entered by the Appellate Court of Illinois, First Judicial District, Fourth Division, on June 25, 1975, Cause No. 60960, denying the petitioner's promotion to Sergeant; a petition for rehearing was denied by the Appellate Court on July 23, 1975, with leave to appeal being denied petitioner by the Supreme Court of the State of Illinois on November 24, 1975.

OPINIONS BELOW

On July 10, 1974, the Circuit Court of Cook County, Chicago, Illinois, entered a judgment against the petitioner and for the respondents sustaining the respondents' position that the promotion of Lt. Dwight Wulf to Chief of Police of the Village of Bellwood Police Department did not result in a vacancy preventing the petitioner from being promoted from the 1968 Sergeant's Promotional Examination to the rank of Sergeant.

On June 25, 1975, the Illinois Appellate Court, First District, Fourth Division, sustained the judgment of the Circuit Court which opinion is reprinted in the Appendix at page 1A.

On July 23, 1975, the Illinois Appellate Court denied the petition for rehearing.

On November 24, 1975 by order of the Supreme Court of the State of Illinois, the petitioner's leave to appeal to the State Supreme Court was denied; the order is reprinted in the Appendix at page 8A.

JURISDICTION

The judgment of the Appellate Court, First District, Fourth Division, was entered on June 25, 1975, affirming the respondents' position that the promotion of Lt. Wulf to Chief of Police of the Village of Bellwood did not result in a Sergeant's vacancy for which vacancy the petitioner had a claim on the basis of a Sergeant's Promotional Examination of 1968. Leave to appeal to the Supreme Court of the State of Illinois was denied on November 24, 1975. The jurisdiction of this Court is invoked under the Fifth and Fourteenth Amendments of the United States Constitution.

QUESTIONS PRESENTED

1. Did the promotion of Lt. Dwight Wulf to Chief of Police of the Village of Bellwood Police Department result in a vacancy for which the petitioner had a claim?

2. Was the 1968 Bellwood Sergeant's Promotional Register properly stricken in 1971 because no vacancy existed in the rank of Sergeant which could have been filled from that register?

3. Did the petitioner waive his right to promotion to Sergeant under the 1968 promotional register by submitting himself to the 1972 promotional examination?

4. Was the petitioner guilty of laches in asserting his claim for promotion to Sergeant under the 1968 promotional examination?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment (V):

> "• • •, nor be deprived of life, liberty, or property, without due process of law; • • •"

United States Constitution, Amendment (XIV):

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On January 21, 1968, the petitioner was a probationary police officer for the Village of Bellwood Police Department.

In 1968 the petitioner subjected himself to a Sergeant's examination wherein he ranked sixth.

That, on November 9, 1967, Lt. Dwight Wulf was promoted to Chief of Police of the Village of Bellwood Police Department.

That, on February 11, 1972, the petitioner had subjected himself to a Sergeant's examination wherein he ranked sixth.

Subsequent to submitting himself to the Sergeant's Promotional Examination of February 11, 1972, the petitioner discovered that there had been an existing Lieutenant's vacancy which should have been filled by the elevation of Lt. Dwight Wulf to Chief on November 9, 1967.

That such a Lieutenant's vacancy indeed did exist was admitted by the Village of Bellwood Fire and Police Commission in that one Sgt. Huntington was promoted to Lieutenant when the issue concerning Lt. Wulf's elevation to Chief was raised in terms of Sgt. Huntington's promotion.

That, since the Lieutenant's vacancy had existed prior to February 11, 1972, as is evidenced by the promotion of Sgt. Huntington to Lieutenant after the February 11, 1972 promotional examination, there was a Sergeant's vacancy which should have been filled by the promotion of petitioner from the 1968 register.

Reviewing the 1968 promotional register, the first four ranked officers were promoted from said register.

The fifth ranked officer, William O'Neill retired on November 18, 1971 leaving the petitioner next in line for a Sergeant's promotion from the 1968 promotional register.

On May 24, 1972, at that specific point of time, the petitioner discovered that a Sergeant's vacancy had existed for which vacancy he filed a claim in a letter dated May 24, 1972 and addressed to the Board of Fire and Police Commissioners of the Village of Bellwood; no response was offered by the Board of Fire and Police Commissioners of the Village of Bellwood concerning petitioner's letter of May 24, 1972; on August 9, 1972, petitioner instituted a lawsuit for a declaratory judgment in the Circuit Court of Cook County, Illinois, County Department, Law Division, Case No. 72 L 10294 which was within six months from the date of the second promotional examination of February 11, 1972, or within two and one-half months from the approximate date of the discovery of the vacancy as described in petitioner's May 24, 1972 correspondence addressed to the Board of Fire and Police Commissioners of the Village of Bellwood.

REASONS FOR GRANTING THE WRIT

I.

THAT THE PROMOTION OF LT. DWIGHT WULF TO CHIEF OF POLICE OF THE BELLWOOD POLICE DEPARTMENT CREATED A LIEUTENANT'S VACANCY IN THAT LT. DWIGHT WULF WAS FURLOUGHED FROM THAT RANK AND THAT SUCH LIEUTENANT'S VACANCY REQUIRED THE PROMOTION OF A SERGEANT TO LIEUTENANT RESULTING IN A SERGEANT'S VACANCY TO WHICH SERGEANT'S VACANCY THE PETITIONER SHOULD HAVE BEEN PROMOTED.

Smith-Hurd Illinois Annot. Stat., Cities and Villages, Chap. 24, Sec. 10-2.1-4.

On page three of its opinion, the Appellate Court states there is no Illinois case directly covering the issue in question; namely, that the promotion of a police officer from a given rank to Chief of Police creates a vacancy in that given rank.

In order for the Appellate Court to decide the issue under consideration, it relies upon *Schoonmaker* v. *George, et al.*, (1974) 74 N.E. 2d 650.

In *Schoonmaker* the Court dealt with a specific Civil Service Commission ruling to the effect that granting leaves of absence to Police Captains did not create vacancies in those ranks as distinguished from the DeGuiseppe matter wherein under the Illinois Fire and Police Commission Act there is no such prohibition.

At the same time, when Chap. 24, Sec. 10-2.1-4 of *Smith-Hurd Illinois Annot. Stat.* is scrutinized with care, the sig-

nificance of the term "furlough" becomes apparent in that it is restricted to a promotional situation involving a police officer from a given attained rank to Police Chief.

As a consequence, the definition of "furlough" in terms of leave of absence as a temporary absence from duty with intention to return is not applicable to the promotion of an officer to Police Chief in that such a promotion is not intended to be a temporary one with an intention to return, since one can only be removed from the rank of Police Chief if he retires, if he resigns or is discharged; only under those three conditions can one terminate his rank as Police Chief.

Therefore, there is permanency attached to the rank of Police Chief which permanency is confirmed by the recent Illinois Supreme Court case of *Bovinette* v. *The City of Mascouth,* 55 Ill. 2d 129 (1973) in which case the Court has rendered the opinion that a Police Chief is guaranteed a fair hearing as any other police officer under the Fire and Police Commissioners Act of the State of Illinois. In effect the *Bovinette* decision provides additional security for one holding the position of Police Chief in terms of permanency.

As a result, it is the legal position of the petitioner that the promotion of Lt. Dwight Wulf to Police Chief resulted in a Lieutenant's vacancy that created a corresponding Sergeant's vacancy. *Smith-Hurd Illinois Annot. Stat.,* Chap. 24, Sec. 10-2.1-4.

Consequently, the interpretation of the Appellate Court of Illinois, First Judicial District, Fourth Division, of *Smith-Hurd Illinois Annot. Stat.,* Chap. 24, Sec. 10-2.1-4, deprives the petitioner of a property right to a Sergeant's promotion violating the Fifth and Fourteenth Amendments of the United States Constitution.

II.

THAT THE SERGEANT'S PROMOTIONAL LIST OF 1968 OF THE VILLAGE OF BELLWOOD DID NOT EXPIRE BASED UPON THE EXISTING SERGEANT'S VACANCY.

People ex rel. Varallo v. *Linskey,* 12 Ill. App. 2d 76 (1956),

Kadon v. *Board of Fire and Police Commissioners of the Village of River Forest,* 45 Ill. App. 2d 425 (1964),

Smith-Hurd Illinois Annot. Stat., Cities and Villages Supp., Chap. 24, Sec. 10-2.1-15.

When Lt. Dwight Wulf was promoted to Chief of Police a vacancy occurred in the rank of Lieutenant with a corresponding created vacancy in the rank of Sergeant, since the promotion of Sgt. Huntington to Lieutenant resulted in a Sergeant's vacancy to which the plaintiff should have been promoted from the 1968 Sergeant's promotional list.

That the petitioner is in the legal position to claim the Sergeant's rank is supported by *Smith-Hurd Illinois Annot. Stat.,* Chap. 24, Sec. 10-2.1-15, in that the 1968 Sergeant's promotional list did not expire within three years on July 13, 1971, since the aforementioned Sergeant's vacancy existed by virtue of Lt. Dwight Wulf's promotion to Chief of Police. *People ex rel. Varallo* v. *Linskey,* 12 Ill. App. 2d 76 (1956), *Kadon* v. *Board of Fire and Police Commissioners of the Village of River Forest,* 45 Ill. App. 2d 425 (1964), *Smith-Hurd Illinois Annot. Stat.,* Cities and Villages Supp., Chap. 24, Sec. 10-2.1-15.

Because the petitioner was first on the 1968 promotional register after the resignation of Officer O'Neill from the Bellwood Police Department, the petitioner bases his claim to the Sergeant's promotion on the same theory that Sgt.

Huntington based his claim for the Lieutenancy; namely, that a vacancy occurred in the rank of Lieutenant when Lt. Dwight Wulf was promoted to Chief, which legal theory was accepted by the Fire and Police Commission of Bellwood; the petitioner should not be treated any differently in advancing the same theory; further, the rule of three would not eliminate the petitioner in that, as in *Kadon* v. *Board of Fire and Police Commissioners of the Village of River Forest,* 45 Ill. App. 2d 425 (1964), petitioner initiated the action for that promotion and has a prior claim to that promotion as *Kadon* had in his lawsuit; likewise the respondents have not relied upon the rule of three in the promotion of officers to the rank of Sergeant as is evidenced by such admission in their Motion for Summary Judgment.

As a result, the interpretation of the Appellate Court of Illinois, First Judicial District, Fourth Division, of *Smith-Hurd Illinois Annot. Stat. Supp.,* Chap. 24, Sec. 2.1-15, deprives the petitioner of a property right to a Sergeant's promotion violating the Fifth and Fourteenth Amendments of the United States Constitution.

III.

THAT THE PETITIONER DID NOT WAIVE HIS RIGHT TO BE PROMOTED FROM THE 1968 PROMOTIONAL LIST WHEN HE SUBJECTED HIMSELF TO A SUBSEQUENT SERGEANT'S PROMOTIONAL EXAMINATION ON FEBRUARY 11, 1972.

Kadon v. *Board of Fire and Police Commissioners of the Village of River Forest,* 45 Ill. App. 2d 425 (1964),

Smith-Hurd Illinois Annot. Stat., Cities and Villages Supp., Chap. 24, Sec. 10-2.1-15.

As to the question of whether petitioner waived his right by himself submitting to a Sergeant's examination on Feb-

ruary 11, 1972, he was not aware of such a vacancy until May of 1972 and had no reason to contest the validity of the 1972 examination until such time.

To permit the petitioner to claim the Sergeant's rank in this instance would no more unfairly prejudice the other members of the Bellwood Police Department than the ruling of the Court in the *Kadon* matter wherein Officer Kadon was promoted to the detriment of one Officer Riley.

Therefore, the interpretation of the Appellate Court of Illinois, First Judicial District, Fourth Division, that the petitioner waived his right to a promotion by submitting himself to a 1972 Sergeant's examination deprived him of a property right to a Sergeant's promotion violating the Fifth and Fourteenth Amendments of the United States Constitution.

IV.

THAT THE PETITIONER WAS NOT GUILTY OF LACHES ON THE BASIS OF THE DISCOVERY RULE AS APPLIED BY THE ILLINOIS COURTS IN OTHER CASES.

Anderson v. *Doss*, 133 Ill. App. 798 (1971),
Rozny v. *Marnul*, 43 Ill. 2d 54, 250 N.E. 2d 656 (1969),
Lipsey v. *Michael Reese Hospital*, 46 Ill. 2d 32, 262 N.E. 2d 450 (1970).

As for laches barring the petitioner's claim, the *Kadon* rule as cited by the Appellate Court in this instance was not applied to Officer Kadon.

In *Kadon*, the Court ruled that laches will not apply if:

1. Respondents' conduct has created the basis for the petitioner's complaint.

2. Petitioner has not delayed in filing his claim after having notice or knowledge of the respondents' conduct.
3. That there is no lack of notice or knowledge on the part of the respondents that the petitioner would assert his right.
4. There is no injury or prejudice to the respondents for the relief granted to petitioner.

As in *Kadon*, the petitioner bases his claim on the conduct of the respondents herein when the Fire and Police Commission of the Village of Bellwood recognized a Lieutenant's vacancy by promotion of Sgt. Huntington to Lieutenant; said recognition of vacancy occurred after the February 11, 1972 promotional examination; within approximately three months of the May 24, 1972 letter addressed to the Fire and Police Commission of the Village of Bellwood, this petitioner asserted his claim for the rank of Sergeant; that assertion of claim as *Kadon's* assertion of claim does not unduly prejudice the other members of the Bellwood Police Department.

The Appellate Court stresses the delay of 54 months in barring the petitioner's claim in this case; however *Kadon* asserted his right approximately 60 months later which right the Court recognized by stating, "At no time (Kadon) slept on his rights and the board at no time was deceived by his adherence to those rights."

In recent Illinois decisions the Courts have enabled plaintiffs to file causes of action after the expiration of statute of limitation on the theory of the so-called "discovery rule", *Anderson* v. *Doss*, 133 Ill. App. 798 (1971), *Rozny* v. *Marnul*, 43 Ill. 2d 54, 250 N.E. 2d 656 (1969), *Lipsey* v. *Michael Reese Hospital*, 46 Ill. 2d 32, 262 N.E. 2d 450 (1970).

The application of the aforementioned "discovery rule" has been accepted to prevent an injustice to plaintiffs from maintaining causes of action wherein they are ignorant or lack knowledge of their right to file such claims.

In this instance the petitioner was not aware of any vacancy until the Fire and Police Commission of the Village of Bellwood, by its promotion of Sgt. Huntington to Lieutenant, created the Sergeant's vacancy on the basis of Lt. Wulf's promotion to Police Chief.

As a consequence, the interpretation of the Appellate Court of Illinois, First Judicial District, Fourth Division, of laches as applied to the petitioner deprives him of a property right to a Sergeant's promotion violating the Fifth and Fourteenth Amendments of the United States Constitution.

CONCLUSION

For the reasons presented, it is respectfully requested that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

STANLEY H. JAKALA
3219 Maple Avenue
Berwyn, Illinois 60402
Telephone: (312) 788-5733
Attorney for Petitioner

APPENDIX A

Opinion of the Appellate Court of Illinois

Mr. Presiding Justice Dieringer delivered the opinion of the court:

This is an appeal from a summary judgment entered by the Circuit Court of Cook County in favor of the defendants.

The issues presented on appeal are (1) Whether the appointment of Lt. Dwight Wulf to Chief of Police of the Bellwood Police Department on November 9, 1967, resulted in a vacancy in the rank of lieutenant; (2) Whether the 1968 Bellwood sergeants' promotional register was properly stricken in 1971 because no vacancy existed in the rank of sergeant which could have been filled from that register; (3) Whether plaintiff waived his right to promotion to sergeant under the 1968 promotional register by submitting to the 1972 promotional examination; and (4) Whether plaintiff is guilty of laches in asserting his claim for promotion to sergeant under the 1968 promotional register.

On November 9, 1967, Lt. Dwight Wulf was appointed Chief of Police of the Village of Bellwood Police Department.

On January 21, 1967, the plaintiff, Frank DeGiuseppe, was hired as a probationary police officer for the Bellwood Police Department. Plaintiff remained on probationary status until January 21, 1968. During this period of employment plaintiff was not eligible for promotion.

(Appendix A)

In April, 1968, plaintiff subjected himself to a promotional examination for the rank of sergeant. Plaintiff ranked sixth on the examination. The patrolmen who ranked one, two and three on the 1968 promotional register were promoted to the rank of sergeant during 1970; the fourth-ranking patrolman was promoted in June, 1971. The promotional register of 1968 for the rank of sergeant remained in effect until July 13, 1971, at which time the list expired and the remaining names were stricken therefrom. The patrolman who ranked fifth on the 1968 promotional register was engaged in active service on the police force at the time the list expired, and remained so until November 18, 1971, when he resigned.

second promotional examination for the rank of sergeant.

On February 11, 1972, plaintiff submitted himself to a The 1972 promotional register was effective as of April 19, 1972. On May 24, 1972, in a letter to the Board of Fire & Police Commissioners of the Village of Bellwood, plaintiff notified the Board he considered himself next in line for a promotion under the 1968 promotional register. On May 26, 1972, the Board promoted Lloyd Howard and Louis Nelson to the rank of sergeant, said promotions being effective as of June 1, 1972, and based upon results of the 1972 promotional examination.

On August 9, 1972, plaintiff instituted a complaint for declaratory judgment alleging the Board erroneously promoted patrolmen Howard and Nelson to the rank of sergeant and should have promoted plaintiff instead. In his complaint, plaintiff alleged that a vacancy had existed in the rank of lieutenant since November 9, 1967, when Lt. Dwight Wulf was appointed Chief of Police. Plaintiff contended that if the alleged lieutenant's vacancy had been filled from the rank of sergeant, then plaintiff would have been eligible for promotion to the rank of sergeant. Defendants filed their answer to plaintiff's complaint, denying plaintiff's allegations as to a vacancy in the rank of lieutenant and asking that the complaint be dismissed. Subsequently, upon leave of court, defendants filed a motion for summary judgment. On July 10, 1974, the trial court entered an order granting defendants' motion for summary judgment.

(Appendix A)

The plaintiff first contends the appointment of Lt. Dwight Wulf to Chief of Police on November 9, 1967, created a vacancy in the rank of lieutenant. Plaintiff argues that such a vacancy required the promotion of a sergeant to the rank of lieutenant, thereby resulting in a sergeant's vacancy which should have been filled by the promotion of plaintiff.

We do not agree with the plaintiff's contention. Section 10-2.1-4 of the Illinois Municipal Code (Ill. Rev. Stats., 1973, Ch. 24, Sec. 10-2.1-4) provides in part as follows:

> "If a member of the department is appointed Chief of Police or Chief of the Fire Department prior to being eligible to retire on pension he shall be considered as on furlough from the rank he held immediately prior to his appointment as chief. If he resigns as Chief or is discharged as Chief prior to attaining eligibility to retire on pension, he shall revert to and be established in such prior rank, and thereafter be entitled to all the benefits and emoluments of such prior rank, without regard as to whether a vacancy then exists in such rank."

(Appendix A)

At the time of Lt. Wulf's appointment to Chief of Police he was ineligible to retire on pension, therefore he was considered to be on furlough from the rank of lieutenant. The term "furlough" is defined as "a temporary leave of absence to one in the armed service of the country, or to a governmental official or an employee." (Black's Law Dictionary, 4th Edition, 1957.) The term "leave of absence" is defined as "temporary absence from duty with intention to return." (Black's Law Dictionary, 4th Edition, 1957.) Although there are no Illinois cases directly on point, the Court of Appeals of Ohio, in *Schoonmaker* v. *George, et al.*, (1947) 74 N.E.2d 650, held that the granting of leaves of absence to two police captains did not create a vacancy in that rank of service. Further, the court held that ". . . any attempted appointment where there is no vacancy, is void and of no legal effect." When Lt. Wulf was appointed Chief of Police on November 9, 1967, he thereupon was on furlough or leave of absence from the rank of lieutenant, and no vacancy existed in that rank. Consequently, no promotion from the rank of sergeant to lieutenant was necessary, and therefore no vacancy in the rank of sergeant existed to which plaintiff could have been promoted.

Plaintiff next contends the 1968 sergeants' promotional register did not expire on July 13, 1971, because a vacancy existed.

For the reasons stated above, we believe no vacancy existed in the rank of sergeant as of July 13, 1971. Section 10-2.1-15 of the Illinois Municipal Code (Ill. Rev. Stats., 1973, Ch. 24, Sec. 10-2.1-15) provides, in pertinent part:

> "All promotions shall be made from the 3 having the highest rating, and where there are less than 3 names

(Appendix A)

> on the promotional eligible register, as originally posted, or remaining thereon after appointments have been made therefrom, appointments to fill existing vacancies shall be made from those names or name remaining on the promotional register . . . The Board shall strike off the names of candidates for promotional appointment after they have remained thereon for more than 3 years, provided there is no vacancy existing which can be filled from the promotional register."

Pursuant to said statutory authority, on July 13, 1971, the Board struck the remaining names on the promotional register and cancelled the list. The names which were stricken, plaintiff's name among them, had remained on the promotional register for more than 3 years and no further vacancies existed in the rank of sergeant to which promotions could be made. The promotional register of 1968 was therefore properly stricken on July 13, 1971.

Even if we assume, *arguendo*, that a vacancy in the rank of lieutenant did occur upon the appointment of Lt. Wulf to Chief of Police on November 9, 1967, plaintiff was on probationary status at that time and was not eligible for promotion. Plaintiff remained ineligible for promotion until July, 1968, when he submitted himself to a promotional examination for the rank of sergeant and placed sixth on the promotional register. Assuming, again, that a vacancy eventualiy existed in the rank of sergeant due to Lt. Wulf's appointment to Chief, the three highest ranking patrolmen on the promotional register would have been considered for promotion. Plaintiff, ranking sixth, would

not have been eligible for promotion. Finally, if the promotion to sergeant were to have been made in July, 1971, plaintiff would still not have been completely vested with the right to promotion. As of July, 1971, the first four eligibles on the promotional register of 1968 had been promoted. Therefore, any promotion occurring on that date would come from those patrolmen ranking fifth, sixth, and seventh on the list. Plaintiff, ranking sixth, would have been a candidate for promotion, but would have had no absolute right to be promoted. The record clearly indicates that at no time did plaintiff have the absolute right to be promoted.

Plaintiff's third contention is that he did not waive his right to promotion under the 1968 promotional register when he subjected himself to the 1972 promotional examination.

We do not agree with plaintiff's contention. Plaintiff willingly subjected himself in February, 1972, to the new examination for promotion without contesting its validity and without making any claim to his alleged rights under the 1968 promotional register. To allow plaintiff to revert back to the 1968 register would unfairly prejudice other members of the Bellwood Police Department and would, in effect, render meaningless any and all promotional examinations administered by the department.

Plaintiff finally contends he was not guilty of laches in asserting his claim for promotion under the 1968 register.

We believe plaintiff's contention is without merit. Laches, an equitable principle, is "the neglect to assert a right or claim which, taken together with the lapse of time and

circumstances causing prejudice to the opposite party, will bar a complaint." (*Dixon* v. *Cahill,* (1973) 10 Ill. App.3d 779.) Delay in asserting complainant's rights is one of the elements of laches. As stated in *Kadon* v. *Board of Fire and Police Commissioners of the Village of River Forest,* (1964) 45 Ill. App.2d 425:

> "[I]n civil service cases, where prolonged delay may easily prejudice governmental bodies, impair orderly procedures and work to the disadvantage of third parties, time is an essential factor."

In the instant case, plaintiff first informed the Board on May 24, 1972, that he elected to stand on his promotional rank on the 1968 list. At that time the 1968 register had expired, a new promotional examination had been given and plaintiff had subjected himself to that test. The alleged vacancy plaintiff complained of was to have existed since November 9, 1967. Plaintiff, therefore, waited 54 months from the time the alleged vacancy occurred before asserting his rights. He then waited 10 months after the 1968 register expired before notifying the Board, and in the interim, subjected himself to another promotional examination. In view of the above, plaintiff clearly delayed an unreasonable length of time in asserting his rights, and was guilty of laches.

For the reasons stated herein, the judgment of the Circuit Court of Cook County is affirmed.

Affirmed.

BURMAN and ADESKO, JJ., concur.

APPENDIX B

State of Illinois
Office of
CLERK OF THE SUPREME COURT
Springfield
November 24, 1975

Mr. Stanley H. Jakala
Attorney at Law
3219 Maple Avenue
Berwyn, Illinois 60402

No. 47808—Frank DeGiuseppe, petitioner, vs. Board of Fire and Police Commissioners of the Village of Bellwood, et al., respondents. Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,
/s/ Clell L. Woods
Clerk of the Supreme Court